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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 578

HENRIK MANNERFRID,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND BRIEF IN SUPPORT

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND BRIEF IN SUPPORT

The Petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit (R. 46) which affirmed an order of the District Court (R. 37) denying petitioner's application for naturalization.

Opinions Below

The opinion of the Court of Appeals is unreported and is set forth at page 42 of the Record herein. The District Court filed an opinion which is reported at 101 F. Supp. 446 (R. 31).

Jurisdiction

The judgment of the Court of Appeals was entered on December 8, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

The issue presented is whether petitioner is barred from naturalization under 50 App. U. S. C. 303(a) because he claimed draft exemption as a neutral alien or whether nonresidence, or mistake, permitted his acquisition of American citizenship.

Statutes and Regulations

The statutes and regulations involved herein are set forth in the appendix herein at page 23 *et seq.*

Statement

Petitioner is a native and citizen of Sweden, 43 years of age, who came to the United States as a temporary business visitor on June 4, 1941 under Section 3(2) of the Immigration Act of 1924 (8 U. S. C. 203(2)). Extensions of his temporary stay were granted until 1947 (R. 10, 12).

On March 16, 1943 when petitioner was still a temporary business visitor and so recognized by the Immigration Service, he claimed draft exemption as a neutral alien pursuant to 50 App. U.S.C. 303(a). (Exhibit 3, R. 26). At the time of claiming such exemption, petitioner filed a letter, (Exhibit 4, R. 29) with his draft board in which he stated that he had conferred with the Swedish Consul Hugo de Thamm who advised him to make such claim of draft exemption. His letter to the draft board states in part.

> "As I am only here in the United States for the duration and will go back to Sweden to my main office Henrik Mannerfrid Aktiebolag as soon as the war is over, and

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as I do not intend to become an American citizen, my friend, Consul Hugo de Thamm advised me to file above application. I also want to state that if I would not have filed this application and joined the American forces, I would automatically have become an United States citizen and as a United States citizen I would be a foreigner in my own country, and as a foreigner, I am not allowed to control any Swedish company or own real estate without certain permissions. As I have quite a large holding of real estate in Sweden and am sole owner of Henrik Mannerfrid Aktiebolag, I thought it best to file the 'Application by Alien for Relief from Military Service' ".

When the above letter and claim for draft exemption were filed, petitioner was unable to return to Sweden because he had made anti-Nazi remarks to some newspaper men [1] and he had thereupon been placed on the Nazi blacklist and denied safe conduct permission to return to Sweden (R. 15). On February 24, 1949, after petitioner's temporary stay in the United States had expired, the Attorney General found that petitioner was eligible for citizenship because he claimed draft exemption on Form D. S. S. 301 (Exhibit 3) under mistake (R. 30). Pursuant to 8 C. F. R. 142 which requires a finding that an alien is admissible to the United States for permanent residence and hence a finding that he is eligible to citizenship (8 U. S. C. A. 213-c),[2] preexamination was authorized by the Attorney General (Exhibit 5, R. 30). A visa was secured by Mannerfrid at Niagara Falls, Canada, after the American Consul there

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[1] The petitioner's interview with reporters is set forth in the New York Times, June 5, 1941, page 9, col. 5. He stated: "Sweden is doing its best to remain neutral at all costs. But I think that I can speak for all Swedes in saying that we soundly detest the Germans."

[2] Petitioner did not come within any of the exemptions of 8 U.S.C.A. 213-c.

satisfied himself that Mannerfrid was eligible for citizenship and admissible to the United States, and the Immigration authorities at Niagara Falls, New York, concurring in such determination, admitted Mannerfrid to the United States for permanent residence on April 5, 1949 (R. 3). On April 9, 1949, petitioner married an American citizen and on April 17, 1951 he filed his application for naturalization as an American citizen pursuant to 8 U. S. C. A. 711 (R. 2). Conflicting recommendations were submitted to the district court pursuant to 8 U. S. C. A. 733(c). The Designated Examiner, without extensive analysis, recommended denial of the petition because of Mannerfrid's claim of draft exemption (R. 16). The Commissioner of Immigration, in a detailed memorandum, concurring in the opinion of the Attorney General, found that petitioner did not knowingly and intentionally waive his right to citizenship as set forth in *Moser* v. *United States,* 341 U. S. 41, and concluded that petitioner was eligible for citizenship (R. 20).

The district court ruled that petitioner did not mistakenly claim draft exemption. It found that although he was a temporary visitor in 1943, petitioner was then residing here and subject to selective service and accordingly denied him naturalization (R. 31-35).

The Court of Appeals affirmed in an opinion which recognized that a close question was presented as to whether *Moser* v. *United States,* 341 U.S. 41, required a contrary result. The Court of Appeals observed (R. 46):

> "We concede that that (Granting naturalization to Mannerfrid) would be no more than a further step of the lenity that the Court exercised in *Moser* v. *United States, supra,* and that the difference is one of degree; but that is so often the determining factor in situations of this kind, that we need not support its propriety if the difference in degree be wide enough."

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Reasons for Granting Certiorari

We believe that certiorari should be granted in the instant case because of the conflict between the decision below and decisions of this Court (*Moser* v. *United States,* 341 U. S. 41; *Kristensen* v. *McGrath,* 340 U. S. 162; *Koshland* v. *Helvering,* 298 U. S. 441; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557) and a conflict with the decision of the Court of Appeals for the District of Columbia Circuit (*Machado* v. *McGrath,* 193 F. 2d 706). Certiorari should be granted because of the importance of the question here presented in the administration of our Immigration and Naturalization laws, and our Selective Training and Service Laws. The issues presented are likewise important in our foreign relations, in the field of administrative law, and in the administration of justice.

1. The decision below is in conflict with *Moser* v. *United States,* 341 U. S. 41 as interpreted by the Court of Appeals for the District of Columbia in *Machado* v. *McGrath,* 193 F. 2d 706 where it was said that an intelligent election was required by a neutral alien before citizenship might be barred. Here, the Attorney General and the Commissioner of Immigration found and the court below conceded that an intelligent election had not been made. The court below, nevertheless, denied citizenship, upon the ground that the case differed by "degrees" from the factual background of the *Moser* case. If the test is "intelligent election" or even, mistake as known in the law of contracts, then petitioner should have his citizenship. (See: Point II, *infra.*) If some other rule should be applied, then the rule of the *Moser* case is neither clear nor meaningful. In any event, the principles applicable herein should be clarified by a decision of the Supreme Court.

2. The decision below is in conflict with *Kristensen* v. *McGrath,* 340 U. S. 162. Kristensen was here two and one-

half years when he claimed exemption as a neutral alien. Petitioner was here only twenty-one months. Kristensen was here illegally. Petitioner was here legally as a visitor at the time he filed the form as a neutral alien. If Petitioner was not residing here for Selective Service purposes, he was not subject to the statute and regulations could not alter his status. The only theory upon which petitioner could be considered a resident is the opinion of the Attorney General in *39 Op. Atty. Gen. 504,* which was repudiated by this Court in the *Kristensen* case.

3. The decision below raises an important principle of administrative law and is in conflict with other decisions of this Court, *Koshland* v. *Helvering,* 298 U. S. 441, 447; *Morrissey* v. *Commissioner,* 296 U. S. 344, 356 and *Manhattan Co.* v. *Commissioner,* 297 U. S. 129. These cases hold that regulations cannot alter or amend a statute, especially where the regulations themselves require explication.

The Court of Appeals held that petitioner was a person residing in the United States under the Selective Training and Service Act because he had not applied after his arrival for a certificate of nonresidence.

In the first place, the regulations were issued pursuant to 50 App. U. S. C. 305a which authorized the President to specify categories of persons *residing in the United States* who would be exempt from military service. But since petitioner was not a resident, the regulations were irrelevant. Petitioner was outside their reach. Secondly, the total failure of the regulations to provide norms or standards for ascertainment of residence has resulted in their condemnation as arbitrary and capricious and violative of due process. *Ex parte Ghosh,* 58 F. Supp. 851, 853-855, appeal dismissed 148 F. 2d 822. Petitioner was not obliged to submit to administrative remedies under regulations which were invalid because of vagueness or because they exceeded statutory authority. *Skinner & Eddy Corp.* v. *United*

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States, 249 U. S. 557, 562; *U. S. ex rel. De Lucia* v. *O'Donovan,* 178 F. 2d 876. Finally it should be noted that the Selective Service System itself, acknowledged that there were neither statutory nor administrative standards defining residence. In *Problems of Selective Service* (1952) it observed: "Resort to the courts was sometimes necessary for a determination of residence, due to the lack of statutory or administrative standards relating to its definition" (p. 125).

4. The issue here presented is important in the administration of the Selective Training and Service Laws. It is not confined to the Selective Training and Service Act of 1940 as the Selective Service and Training Act of 1948 (62 Stat. 604, 50 Appendix U. S. C. 454 prior to amendments in 1951 (65 Stat. 1073) was likewise restricted to "every male citizen of the United States and every other male person residing in the United States." The statute provided for exemption claims by neutrals as well as non-neutrals, with an accompanying citizenship bar, 50 App. U. S. C. 454(a). And the regulations sought to subject to registration those here six months (32 CFR 611a) and to service, aliens, including temporary visitors, who remained longer than twelve months (32 CFR 622.18, E. O. 9992, 13 F. R. 6101). A clarification of the statutory language in the instant case is therefore necessary as a guide to the Selective Service authorities in the interpretation of the 1940 as well as the 1948 Act so that they may know whether temporary visitors were within the terms of the statute and whether they might promulgate regulations covering such individuals.

Under the 1940 Act alone, approximately, 1,000,000 aliens were subjected to military service. A sampling of some 60,000 cases in 1942 revealed that over 1,000 neutral and co-belligerent aliens had objected to military service (*Problems of Selective Service, supra,* pp. 99, 118). It is therefore apparent that under the 1940 and 1948 Selective

Training and Service Acts, several thousand aliens may be uncertain of their eligibility status to American citizenship until a ruling by this court on the issues presented herein.

5. The issue presented here is important in our foreign relations. Recently France, by way of retaliation, enacted a law, to draft Americans who stay in that country more than a year.[3] We have likewise experienced trouble with such countries as Israel and Canada because they sought to draft our nationals.[4] And when, our nationals are subjected to army service in foreign countries, they experience difficulty in establishing their American citizenship (*Mandoli* v. *Acheson*, No. 15, this Term). In international law it is thoroughly established that a temporary visitor or sojourner is not subject to military service in the country of his visit or sojourn. IV *Moore, International Law Digest* 57; III *Hackworth, Digest of International Law*, 600. We have frequently protested against the induction of American citizens temporarily and lawfully sojourning abroad. III *Hackworth, supra*, 362. The language of the Selective Service Act should be interpreted consistently with our international contentions. Justice Jackson, *Kristensen* v. *McGrath, supra.*

6. A ruling upon the issue here presented is important to the administration of justice. An erroneous ruling by the Department of Justice, *39 Op. Atty. Gen. 504*, resulted in Selective Service Regulations, which improperly sought to subject the petitioner, a mere sojourner in the United States, to military duty. As a matter of fair play, petitioner, and the many visitors similarly situated, should have their status corrected, especially since it may mean

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[3] Washington Post, December 19, 1952.

[4] Washington Sunday Star, October 26, 1952, Evening Star, December 15, 1952.

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the difference between perpetual alien status or banishment from the United States and continued residence here.

Summary of Argument

Petitioner submits that the findings of the Attorney General and the Commissioner of Immigration—findings which are entitled to great weight—should be approved in view of the rationale of *Moser* v. *United States*, 341 U. S. 41. Moreover, petitioner contends that as a temporary visitor caught here by the war, he was not residing in the United States in 1943, was not subject to the Selective Training and Service Act of 1940 and is not barred from citizenship. *Guessefeldt* v. *McGrath*, 342 U. S. 308; *Kristensen* v. *McGrath*, 340 U. S. 162; *Ex parte Ghosh*, 58 F. Supp. 851, appeal dismissed, 148 F. (2d) 822.

I

The Circuit Court Erred in Finding That Petitioner Was a Resident, Subject to the Selective Training and Service Act and Its Regulations

Petitioner came to the United States from Sweden on June 4, 1941 when he was admitted as a temporary business visitor (R. 10, 12, 20). He was required to present both a passport and a non-immigrant's visa issued by the State Department to gain entry to the United States (22 C. F. R. 53.28-53.31). Accordingly, petitioner was recognized both by the State Department and the Immigration Service (8 C. F. R. 119) as a lawful business visitor from 1941 to 1947 (R. 10, 12). Moreover, petitioner testified, and it is undisputed, that he came here for a short visit, that he maintained his main business office in Sweden, and that he was unable to return to Sweden because he was placed upon the German blacklist and thereby denied safe return passage to Sweden

(R. 15, 29). In 1943, when he claimed draft exemption, petitioner was a lawful business visitor.

On the record herein, the issue to be determined *in limine* is whether petitioner, a lawful temporary visitor, recognized as such by the State Department and the Department of Justice, is a person *residing* in the United States for Selective Service purposes.

In *Kristensen* v. *McGrath*, 340 U. S. 162, the court said:

> "If Kristensen was not 'residing' at the time of his application for relief, he could not have had 'such liability' for service. . . . As there was no liability for service, his act in applying for relief from a nonexistent duty could not create the bar against naturalization. By the terms of the statute, that bar only comes into existence when an alien resident liable for service asks to be relieved.
>
> • • • • • • •
>
> The phrase of #3(a) 'every other male person, residing in the United States,' when used as it is, in juxtaposition with 'every male citizen', falls short of saying that every person in the United States is subject to military service.
>
> • • • • • • •
>
> When we consider that #3 (a) was obviously intended to require military service from all who sought the advantages of our life and the protection of our flag, we cannot conclude, without regulations so defining residence, that a sojourn within our borders made necessary by the conditions of the times was residence within the meaning of the statute."

Justice Jackson in a separate concurring opinion declared:

> "The United States consistently has asserted the right of its citizens to be free from seizure for military

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duty by reason of temporary and lawful presence in foreign lands. Immunities we have asserted for our own citizens we should not deny to those of other friendly nations. Nor should we construe our legislation to penalize or prejudice such aliens for asserting a right we have consistently asserted as a matter of national policy in dealing with other nations. Of course, if an alien is not a mere sojourner but acquires residence here in any permanent sense, he submits himself to our laws and assumes the obligations of a resident toward this country.

The language of the Selective Service Act can be interpreted consistently with this history of our international contentions. I think the decision of the Court today does so."

In *Machado* v. *McGrath*, 193 F. 2d 706 (C. C. D. C.), the *Kristensen* case is distinguished upon the ground that appellant was a resident, because he failed to apply within three months for a certificate of non-residence pursuant to 32 C. F. R. 611.21. The Court said:

"Appellant argues, however, that regulations which, in his case, make a mere temporary visitor of four months a resident cannot be valid. We disagree. The regulations do not arbitrarily state that anyone who remains here longer than three months shall be deemed a resident regardless of the purpose, duration or circumstances of his presence. They merely require that one who comes to this country in time of war must act within three months to have his status as a resident determined. If the required application is filed, the alien will have his case judged by the applicable administrative and judicial standards. * * * But if it is not filed, then his status as a resident is in effect taken as confessed."[5]

[5] The Selective Service System, however, acknowledges that it had no administrative standards for determining residence. For judicial standards, moreover, as late as 1952, it turns to *Benzian* v. *Godwin*, 168 F. 2d, 952 and *39 Op. Atty. Gen. 504*, opinions which were overruled by this Court in 1950 in *Kristensen* v. *McGrath*, 340 U.S. 162.

It is submitted that the reasoning of the *Machado* case overlooked three important considerations in reaching this determination. First, it is obvious that if petitioner was not residing here, he was not subject to the statute or the regulations. Secondly, it should be observed that the regulations provided no standard whatsoever for determining which visitors, here more than three months, were residents and which were to be treated as non-residents. Finally, it must be remembered that the regulations were framed in 1942, on the basis of the decision of the Department of Justice, *39 Op. Atty. Gen. 504*, which erroneously assumed that all aliens physically present in the United States were subject to the Selective Training and Service Act of 1940. The regulations therefore attempted to expand the meaning of the term "residing" beyond its statutory meanings and were accordingly invalid.

1. The regulations are irrelevant because petitioner, by statutory definition was outside their reach. The regulations were promulgated pursuant to 50 App. U. S. C. 305a which authorized the President to specify the categories of persons *residing in the United States*, who would be exempt from military service. This provision, as was 50 App. U. S. C. 303a, was limited by its terms to persons *residing in the United States*, which necessarily excluded petitioner. Hence there was no statutory authority for regulations which required any affirmative action on the part of petitioner. He was not required to submit to regulations which exceeded the statutory authority of the Selective Service System. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; *U. S. ex rel. De Lucia* v. *O'Donovan*, 178 F. 2d 876. Whatever the rule may be in the District of Columbia, the Second, Sixth, and Seventh Circuits and this Court do not require exhaustion of administrative remedies where the administrative body lacked jurisdiction or exceeded its

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statutory powers. *U. S. ex rel Bradley* v. *Watkins*, 163 F. (2d) 328 (2d Cir.); *Varney et al.* v. *Warehime et al.*, 147 F. (2d) 238, 243 (6th Cir.); *U. S. ex rel De Lucia* v. *O'Donovan, supra* (7th Cir.); and see: *Gonzales* v. *Williams*, 192 U. S. 1, 15; *United States* v. *Sing Tuck*, 194 U. S. 161; *Public Utilities Comm.* v. *United Fuel Gas Co.*, 317 U. S. 456; *Ogden City* v. *Armstrong*, 168 U. S. 224.

Since they were non-residents, the Selective Service System had jurisdiction neither of petitioner nor Machado. They were therefore not obliged to resort to its administrative machinery or be estopped from asserting their non-residence.

2. In *Ex Parte Ghosh*, 58 F. Supp. 851, appeal dismissed, 148 F. (2d) 822 the Court held that an alien who entered the United States in 1940 on a student's visa was not a resident four years later and therefore was not subject to military training. It was there said:

> "I do think the action of the local board was arbitrary and capricious when it reversed its three previous determinations that he was not a resident of the United States. I do not think there was an evidence to support it.
>
> I do not think the rules and regulations provide any norm or standard by which the local board can determine whether or not a person is in one of the 'other categories' mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, # 305; nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a person is or is not 'residing in the United States' as the term is used in Sections 2 and 3 of the Act, 50 U. S. C. A. Appendix # 302, 303.
>
> In connection with this matter the determination by the Bureau of Naturalization and Immigration that this man retained his student status and is thus not a resident, must be given weight. He is not, under the Immigration and Naturalization Laws, entitled to

citizenship, or to be a permanent resident of the United States, or a resident at all. At the most, he can only be a visitor, and that only so long as he remains a student.

* * * * * * *

And after all, it is one government, and I do not think it is within the contemplation of our system that a man should be fish before one department and fowl before another. If he can be a student-visitor--and not a resident—so far as the government of the United States is concerned when it is interpreted by the Department of Immigration and Naturalization, and be a resident so as to subject him to military service on behalf of the United States insofar as some other government department is concerned, it would require I think what John Marshall called refined and metaphysical reasoning.

* * * * * * *

I believe that the power existed under Section 5 of the Act for the President to establish 'categories of people' who would be non-residents. But the President delegated his power to the Director of Selective Service in that connection. The Director of Selective Service did not either in his own name or in the name of the President specify or establish any categories other than those that, in the Act are designated with particularity.

I think he has simply, under the regulations as they now stand, reserved to himself the power personally to determine—by what rules, no one would know—this petitioner or any other person who sought a certificate of exemption [as a non-resident]—whether he was or was not entitled to it.

That in my judgment, is what is described in the decisions as arbitrary and capricious, and I would say lack of due process and a lack of rule of reason."

We submit that *Ex Parte Ghosh* accurately describes the invalidity of the regulations for failure to provide norms or standards for determination of non-residence.

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3. The Selective Service Regulations under the 1940 Act were founded upon the opinion of the Attorney General in *39 Op. Atty. Gen. 504* which erroneously held that all aliens physically present in the United States were subject to military training. In international law it is thoroughly established that a temporary visitor or sojourner is not subject to military service in the country of his visit or sojourn. IV *Moore, International Law Digest* 57; III *Hackworth, Digest of International Law,* 600. We have frequently protested against the induction of American citizens temporarily and lawfully sojourning abroad. III *Hackworth, supra,* 362. The language of the Selective Service Act should be interpreted consistently with our international contentions. Justice Jackson, *Kristensen* v. *McGrath, supra.*

The only theory upon which petitioner could be considered a resident is the opinion of the Attorney General in *39 Op. Atty. Gen. 504,* which was repudiated by the Supreme Court in the *Kristensen* case.

The government, by reason of Attorney General Jackson's opinion, misled petitioner into believing that he was required to serve in our army as a resident or claim exemption as a neutral. If the Selective Service System had been properly advised of the meaning of the term, residence, in 1943, it never would have called petitioner for army service and he never would have been confronted with the problem presented by this case.

In *Stockstrom* v. *Commissioner,* 190 F. 2d 283, the Court of Appeals ruled:

> "It has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to ordinary fair play from tax officials. We regard as unconscionable the Commissioner's claim of authority to assess a tax in 1948 because of Stockstrom's failure to file a return for 1938, when the Commissioner himself was responsible for that failure."

In *Staten Island Hygenia Ice and Cold Storage Co.* v. *U. S.*, 85 F. (2d) 68 the Court held that a cause of action for rescission of a tax compromise was stated where it was alleged that a mistake of law was induced by a United States tax collector. The court said at page 71:

> "Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant . . . It should make no difference that the United States is the party against whom rescission is sought."
>
> See also: *Moser* v. *United States,* 341 U. S. 41.

The government's mistake as to the law placed petitioner in his present predicament. It should not now subject him to the loss of the privilege of citizenship because he acted upon the false assumption induced by the government that he was required to claim exemption as a neutral alien, or submit to army service as a resident.

The regulations as originally promulgated, effective February 7, 1942, 7 Fed. Reg. 855, provided that an alien who did not file a citizenship declaration and remained here less than three months was a non-resident. The alien who remained more than three months was required to file an application to determine his non-residence within three months of his entry if he was of military age. On June 27, 1945, the regulations were amended to permit an application for determination of residence to be filed after three months (32 C. F. R. 611.27; *Benzian* v. *Godwin,* 168 F. (2d) 592, Note 9). As noted in the *Ghosh* case, the regulations provided no standards for determining under what circumstances an alien here longer than three months was to be considered either a resident or non-resident.

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Kristensen was in the United States two and a half years when he claimed draft exemption. *Ghosh* was here four years when he was inducted. *Kristensen* was here illegally at the time of his draft exemption claim. Yet *Kristensen* and *Ghosh* were held to be non-residents. Petitioner was here temporarily and legally for one year and nine months when he claimed exemption. Petitioner should not be in a worse position than *Kristensen,* because unlike the latter, he did not violate the terms of his temporary admission and become subject to deportation. His position should be stronger. He abided by the terms of his temporary admission. In addition, because he was caught here by the war, petitioner should not be considered a resident. *Guessefeldt* v. *McGrath,* 342 U. S. 308. For immigration purposes he was a non-resident, for naturalization purposes, he was not a resident. *In re Wieg,* 30 F. (2d) 416. For income tax purposes he was a non-resident. 29.211-2 Income Tax Regulations. In the absence of a clear Congressional intent to the contrary, and there was none (Senate Report 915, House Report 1554, 77th Congress 1st Sess., 87 Cong. Rec. 9905, 10055), it must be assumed that the Selective Training and Service Act of 1940 used the term "residing" in its normal legal and lay sense. Thus, petitioner, a legal temporary visitor, was not an alien resident subject to military service under the statute.

> "Where . . . the provisions of the act are unambiguous, and its directions are specific, there is no power to amend it by regulations." *Koshland* v. *Helvering,* 298 U. S. 441, 447.
>
> "The question . . . is simply one of statutory construction . . . The difficulty with the regulations as an exposition was that they themselves required explication; that they left many questions open with respect both to the application to particular enterprises and to their validity as applied." *Morrissey* v. *Commissioner,* 296 U. S. 344, 356.

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the Statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Co.* v. *Commissioner,* 297 U. S. 129.

The Regulations of Selective Service under the 1940 Act come within the condemnation of the foregoing quotations of the Supreme Court. The regulations could not alter the meaning of the word "residing" under the statute and an administrative ruling that petitioner was a resident would not be legally sustainable. In any event no regulation provided any standard for determining the residence or non-residence of a person in petitioner's position. *Ex parte Ghosh, supra.* Unlike *Kristensen,* where there might be some doubt since *Kristensen* was no longer a lawful temporary visitor when he claimed exemption, here the petitioner was clearly a legal temporary visitor—a non-resident. Hence, regulations could neither clarify nor alter his status and he is eligible for naturalization under the *Kristensen* doctrine.

II

The Circuit Court Erred in Finding That Petitioner Knowingly and Intentionally Waived His Rights to Citizenship

Petitioner mistakenly believed that he was subject to the Selective Service Act because of the erroneous opinion of Attorney General Jackson that all persons physically present in the United States were subject to service. For the reasons noted above, we believe that such mistake induced by the government was sufficient to remove the citizenship

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bar if it ever were applicable to petitioner. In addition, for the reasons noted by the Commissioner (R. 20-26) we believe that petitioner did not knowingly and intentionally waive his rights to citizenship.

Petitioner while here as a temporary visitor, mistakenly assumed, as found by the Commissioner, that he was required to make a choice between Swedish citizenship and Army service accompanied by automatic American citizenship. Petitioner believed that the choice of service in our army would require him, a temporary visitor, to return to his home in Sweden and to his place of business there as a foreigner. This mistaken assumption on his part was made known to the official of his draft board who never advised petitioner of the true consequences of army service. The Commissioner notes in this respect that (R. 23):

> "The belief that service in our army would confer American citizenship is a common misunderstanding shared by many citizens and non-citizens. That the petitioner filed Form D. S. S. 301 under a mistake is therefore clearly established on the facts herein set forth. This is not a case where mistake is asserted by the mere oral declaration of the alien. The letter on file with the draft board, the advice given by the Consul and the Swedish law all corroborate the claim of mistake, and establish it beyond any doubt. Thus it is recognized that the equitable factors involved in this case may be considered to determine whether the exemption claimed is a perpetual bar to the petitioner's naturalization. It is true that the mistake was unilateral, but it was a misunderstanding which was known to the draft board by the letter filed at the time of the claim of draft exemption. It is therefore the type of mistake which justifies relief. (Sec. 505, Restatement of Law of Contracts.)"

It will be noted that the Commissioner and, apparently, the Attorney General found mistake applying the strict

rules of contract law. It is submitted, although the court is not bound by such rulings, that these administrative determinations made in the administration of our immigration laws, are entitled to great weight and should not be disapproved unless clearly erroneous.

U. S. ex rel. Tisi v. *Tod*, 264 U. S. 131;
U. S. ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U. S. 103;
Costanza v. *Tillinghast*, 287 U. S. 341.

Moreover, the strict rules of contract law need not be applied to this case, for the Supreme Court has indicated that the more lenient rules of election are to be followed.

In *Moser* v. *United States*, 341 U. S. 41, the petitioner claimed exemption from the draft as a neutral alien under the impression that he had a right to do so pursuant to a Swiss treaty without incurring the permanent bar to citizenship provided by Section 3(a) of the Selective Service and Training Act of 1940. The court found that the petitioner was understandably lulled into a misconception of the *legal consequences* of applying for exemption. It stated at page 47:

> "Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness."

The District of Columbia Circuit Court in the *Machado* case, *supra*, held:

> "As in the *Moser* case, we believe Machado was entitled to have the 'opportunity to make an intelligent election'

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> between being subject to the draft on the one hand, and being exempt but losing the right to become a citizen on the other. See *Johnson* v. *United States*, 318 U. S. 189, 197 (1943). The sound reason for affording such an opportunity arises in good part from our conviction that American citizenship being a most precious right, its denial should not be allowed to rest upon a doubtful premise."

The law is clear that there is no election when the subject is not in possession of the facts. The rule is clearly stated in 20 *Corpus Juris*, page 35, paragraph 28, as follows:

> "In order to constitute a binding election the party must, at the time the election is made, have had knowledge of the facts from which the coexisting, inconsistent remedial rights arise, since any position taken by a party before knowing all the facts should be classed as a mistake and not as an election."

An election between two remedies necessarily implies knowledge that there are two remedies and an election made by a person under a mistake of fact, or a misconception of his rights is not binding whether the mistake is one of law or one of fact.

Gardner v. *Gauthier*, 101 Vt. 147;
Cook v. *Commercial Casualty Ins. Co.*, 160 F. (2d) 490;
Albert v. *Martin Custom Made Tires Corp.*, 116 F. (2d) 962, 964, 28 *C. J. S.* page 1098, paragraph 24.

In *Albert* v. *Martin Custom Made Tires Corp., supra*, Judge L. Hand summarized the law of election of remedies in New York stating that when an individual

> "mistakenly either affirms or disaffirms the transaction by pressing an action to final defeat, he may reverse his position since he has in fact never had any choice."

Applying the doctrine of election to the instant case and the principles of the *Moser* and *Machado* cases, it appears

that the findings of the Commissioner and the Attorney General should be approved.

Petitioner like *Moser and Machado* did not knowingly and intentionally waive his rights to citizenship. The government misled petitioner into believing that he was subject to the Selective Training and Service Act, and he mistakenly believed that he was in fact liable for such service. He believed he was required to elect between army service and expatriation and expropriation of his property in Sweden. The election which he made was under a misconception of fact as well as of his legal rights and was not a binding election. It is therefore submitted that petitioner is eligible for citizenship as recommended by the Commissioner. In view of the findings by the Attorney General and the Commissioner, denial of citizenship here, as in the *Machado* case would indeed be upon a doubtful premise.

Conclusion

In view of the conflict that the decision of the Court below presents with decisions of this Court, in view of the importance of the question presented and the necessity of clarifying the issues raised herein, it is respectfully requested that petitioner's application for certiorari be granted.

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APPENDIX

Statutes

Section 303(a) of Title 50, Appendix, United States Code, (the Selective Training and Service Act of 1940 as amended) pertaining to exemption of neutral aliens from military service, reads in part as follows:

> "Persons liable for training and service; number; term; status after completion of term; pay; allowances; and benefits; place of employment
>
> (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . ."

Section 305(a) of Title 50, Appendix, United States Code, provides:

> "* * * persons in other categories to be specified by the President, *residing* in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, shall not be required to be registered under section 2 and shall be relieved from liability for training and service under section 3(b)."

Regulations

The following regulations were effective February 7, 1942, 7 Fed. Reg. 855:

32 C. F. R. 611.12. When a nondeclarant alien is residing in the United States. Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of #611.13, is a 'male person residing in the United States' within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

32 C. F. R. 611.13 When a nondeclarant alien is not residing in the United States. (a) A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended:

• • • • • • •

(6) If he has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later.

(b) When a male alien who has not declared his intention to become a citizen of the United States has entered or hereafter enters the United States in a manner prescribed by its laws and remains in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later, he is a 'male person residing in the United States' within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, unless he has filed an Alien's Application for Determination of Residence (Form 302) in the manner provided in

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#611.21 and such application is either (1) pending or (2) has resulted in a determination that he is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, in either of which events he shall not be considered as a 'male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, during the period when such application is pending or during the period covered by the Alien's Certificate of Nonresidence (Form 303) issued to him as a result of the determination that he is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended. (54 Stat. 885; 50 U. S. C., Supp. 301-318, inclusive; E. O. No. 8545, 5 F. R. 3779).

[Effective January 17, 1946, the above paragraph 6 was renumbered and amended to read as follows (*Problems of Selective Service,* Appendices A-C, pp. 35-36):

(7) He has, within the time prescribed and in the manner provided in section 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired."]

32 C. F. R. 611.21. What aliens may apply for a determination. Any nondeclarant alien who has entered or who hereafter enters the United States * * * may file with his local draft board * * * an Alien's Application for Determination of Residence (Form 302); *Provided,* That such application is filed within three months after the date of his entry into the United States or within three months after persons of his age

become liable for training and service by law, whichever is the later; *And provided further,* That such application is filed prior to induction * * *.[6]

[Effective, June 27, 1945 (10 F. R. 7906), Section 611.21-1 was added (*Problems of Selective Service,* Appendices, A-C, p. 37), reading as follows:

"*Application filed after 3 months.* Any alien who has not complied with the provisions of section 611.21 or section 611.26 may file an Alien's Application for Determination of Residence (Form 302) and an Alien's Personal History and Statement (Form 304) with a local board for transmittal to the Director of Selective Service for consideration."]

32 C. F. R. 611.22. Determination by local board. (a) As soon as possible after an alien who is entitled to do so filed with the local board an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), the local board shall determine whether such alien is 'a male person residing in the United States' within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

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[6] Originally this section, promulgated in 1942 (7 F. R. 2084) required a claim of non-residence to be filed prior to May 16, 1942 for those here before February 16, 1942. The section was amended to read as noted in the text in 1943 and republished in the same form again in 1945.

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